

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DR. JOHN SCHIEFELBEIN and  
MRS. MEGAN SCHIEFELBEIN,  
husband and wife and the marital  
community composed thereof,  
  
Plaintiffs,

v.

CERTAINTIED GYPSUM  
CANADA, INC. a successor in interest  
to Les Industries Westroc; and SAINT-  
GOBAIN CORPORATION, as  
successors in interest to Les Industries  
Westroc,  
  
Defendants.

NO: CV-12-400-RMP

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR A PROTECTIVE  
ORDER

This matter comes before the Court on a motion for a protective order, ECF  
No. 4, by Defendants Certainteed Gypsum Canada, Inc., Saint-Gobain  
Corporation, and Les Industries Westroc (collectively, "Defendants"), to govern  
the remediation efforts of Plaintiffs John and Megan Schiefelbein on the house that

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1 forms part of the subject matter of this case. The Court heard telephonic oral  
2 argument on the motion on July 5, 2012. The Court has further reviewed the  
3 parties' filings regarding the motion, the remaining record in this case, applicable  
4 law, and is fully informed.

5 Plaintiffs are pursuing a products liability claim against Defendants on the  
6 basis of allegedly defective and corrosive drywall. Defendants already have  
7 inspected the house and taken some samples of drywall and other materials from  
8 the house but seek to secure additional samples in the course of Defendants'  
9 investigation in preparation for trial and/or potential settlement discussions.

10 Meanwhile, Plaintiffs are engaging a contractor to remove and destroy much of the  
11 drywall as part of a large-scale effort to restore the house to a condition that  
12 Plaintiffs consider to be habitable. By the time Defendants filed their reply and  
13 participated in oral argument on the present motion, Defendants no longer seek to  
14 halt the demolition and repair work on Plaintiffs' house. Rather, Defendants seek  
15 an imposition of conditions on the work to preserve an opportunity for Defendants  
16 to gather samples from the house at certain steps in the construction process and  
17 document the materials that are removed. *See* ECF No. 26.

18 The parties are already under a duty to preserve evidence that is relevant or  
19 could reasonably lead to the discovery of admissible evidence. *Leon v. IDX Sys.*

1 *Corp.*, 464 F.3d 951, 959 (9th Cir.2006). The parties agree that the material for  
2 which Defendants seek protection is relevant.

3 The Court may enter an order for the preservation of evidence on the motion  
4 of a party. In considering such a motion, other district courts, both in the Ninth  
5 Circuit and across the country, have adopted a balancing test and weighed: (1) the  
6 level of concern the court has for the continuing existence and maintenance of the  
7 integrity of the evidence in question in the absence of an order directing  
8 preservation of the evidence; (2) any irreparable harm likely to result to the party  
9 seeking the preservation of the evidence absent an order directing preservation; and  
10 (3) the capability of an individual, entity, or party to maintain the evidence sought  
11 to be preserved.

12 *Jacobs v. Scribner*, 2007 WL 1994235 at \*1 (E.D.Cal. July 5, 2007) (citing *Daniel*  
13 *v. Coleman Co., Inc.*, 2007 WL 1463102 at \*2 (W.D.Wash. May 17, 2007) (citing  
14 *Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corporation*,  
15 220 F.R.D. 429, 433-34 (2004)).

16 The first two factors of this balancing test weigh in favor of Defendants in  
17 light of Plaintiffs' acknowledgement that the sheetrock will be destroyed early in  
18 what Plaintiffs characterize as their remediation process. The Court finds that  
19 these two factors support the imposition of terms to assure that Defendants may  
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1 engage the professionals of their choice to collect and catalogue materials at issue  
2 in this lawsuit before those materials are destroyed.

3 However, the third consideration weighs rather in Plaintiffs' favor, as  
4 Plaintiffs legitimately seek to complete the construction of their house in a timely,  
5 efficient, and economical manner. In addition, Defendants concede that Plaintiffs  
6 previously have made the evidence available to Defendants and continue to allow  
7 Defendants access to Plaintiffs' house, examine the evidence, and obtain samples  
8 of the evidence. This factor supports limiting the extent to which Defendants may  
9 compel Plaintiffs to accommodate the schedule and work pace of Defendants'  
10 selected corrosion expert, Ockert van der Schijff.

11 Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART**,  
12 Defendants' motion for a protective order, **ECF No. 4**, as follows:

- 13 1. As agreed by the parties on approximately July 3, 2012, Plaintiffs  
14 shall not remove drywall prior to July 23, 2012.
- 15 2. Plaintiffs and, by extension, their contractor, shall permit and  
16 cooperate with Defendants' chosen expert, Mr. van der Schijff, or  
17 other consultants under Mr. van der Schijff's guidance, to:
  - 18 a. Observe removal of drywall from interior walls, which must be  
19 completed in some systematic, orderly manner, such as marking  
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1 the drywall sheets to indicate the room from which they were  
2 removed;

3 b. Inspect and document (through photography, video, or the like)  
4 the back side of each removed drywall sheet for identification  
5 markings;

6 c. Collect approximately 12" x 18" samples of drywall, if deemed  
7 necessary;

8 d. Inspect and document electrical wiring and copper piping inside  
9 wall cavities after they have been exposed by the removal of  
10 drywall.

11 e. Collect samples of copper piping;

12 f. Inspect, document, and sample any other components that will  
13 be replaced due to alleged damage;

14 3. All of the observation, collection, and documentation allowed in  
15 Paragraph 2 shall occur with deference to Plaintiffs' contractor's  
16 schedule and priorities, meaning that should Mr. van der Schijff not  
17 be able to keep up with the contractor, Defendants must arrange for  
18 additional help to take the samples and conduct the preservation work  
19 under Mr. van der Schijff's direction.  
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